Office - Supreme Court, U.S.
FILED
JUL 8 1983
ALEXANDER L. STEVAS
CLERK

Nos. 82-818 and 82-852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

IN SUPPORT OF AFFIRMANCE
BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

JOHN S. IRVING
CARL L. TAYLOR
KIRKLAND & ELLIS
1776 K Street, N.W.
Washington, D.C. 20006
(202) 857-5000

Of Counsel:
STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does federal labor policy impliedly exempt union workers from sharing the burden of a Chapter 11 reorganization unless the bankrutpcy court finds that the maximum possible sacrifices by nonunion workers and other creditors will be insufficient to save the company?

2. Should the lengthy and complex procedures for midterm contract modification established by Section 8(d) of the National Labor Relations Act be imported into reorganizations under Chapter 11 of the Bankruptcy Code?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
INTEREST OF THE AMICUS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. THE HARSH DISCRIMINATIONS AND INFERIOR PLANS OF REORGANIZATION MANDATED BY THE MECHANICAL THRESHOLD TEST URGED BY PETITIONERS ARE CONTRARY TO FEDERAL BANKRUPTCY AND LABOR POLICIES AND SHOULD BE REJECTED	6
A. The Proposed Test Compels Bankruptcy Courts To Squeeze All Possible Sacrifices Out of Nonunion Employees Without Regard for Competing Equities Before Assigning Any Burden to Union Employees	6
B. The Effects of the Proposed Threshold Test Would Violate Federal Labor Policy	8
1. The discrimination against nonunion workers mandated by the proposed test violates the strong labor policy of neutrality between union and nonunion workers	9
2. This discrimination is not necessary to preserve labor peace by fostering collective bargaining	10

TABLE OF CONTENTS—Continued

Page

3. In fact, the proposed test would remove important incentives to collective bargaining that the approach of the Third and Eleventh Circuits preserves 13

C. The Proposed Test Also Would Violate the Bankruptcy Code's Policies of Fairness, Equitability, and Feasibility 15

II. THE LENGTHY AND CUMBERSOME PROCEDURES FOR CONTRACT TERMINATION ESTABLISHED BY SECTION 8(d) OF THE NLRA SHOULD NOT BE IMPORTED INTO CHAPTER 11 OF THE BANKRUPTCY CODE 18

CONCLUSION 22

TABLE OF AUTHORITIES

CASES Page

Allied Electric Products, Inc., 109 N.L.R.B. 1270 (1954) 9

Belknap, Inc. v. Hale, —— U.S. ——, 127 DLR D-1 (June 30, 1983) 10

Bill Johnson's Restaurants, Inc. v. NLRB, —— U.S. ——, 51 U.S.L.W. 4636 (May 31, 1983) 18

Brotherhood of Railway Clerks v. REA Express, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975) ..... *passim*

Carpenters Local No. 1846 v. Pratt-Farnsworth, 690 F.2d 489 (5th Cir. 1982) 12

Cramer v. Mammoth Mart, Inc., 536 F.2d 950 (1st Cir. 1976) 20, 21

Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249 (1974) 12, 13

In re Beaver, 2 B.R. 337 (Bankr. S.D. Cal. 1980) 16

In re Brada Miller Freight Systems, Inc., 702 F.2d 890 (11th Cir. 1983) ..... *passim*

In re Cooper, 3 B.R. 246 (Bankr. S.D.Cal. 1980) 16

In re David A. Rosow, Inc., 9 B.R. 190 (Bankr. D.Conn. 1981) 7, 8

In re Economy Cast Stone Co., 16 B.R. 647 (Bankr. E.D.Va. 1981) 16

In re Muskegon Motor Specialties, 366 F.2d 522 (6th Cir. 1966) 16

In re Pine Lake Village Apartment Co., 19 B.R. 819 (Bankr. S.D.N.Y. 1982) 16

In re Unishops, 543 F.2d 1017 (2d Cir. 1976) 21

Jet Line Products, Inc., 229 N.L.R.B. 322 (1977) 19

Local 57 ILGWU v. NLRB, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942 (1967) 9

Local Joint Executive Board v. Hotel Circle, Inc., 419 F. Supp. 778 (S.D.Cal. 1976), *aff'd*, 613 F.2d 210 (9th Cir. 1980) 18

NLRB v. Bildisco, 682 F.2d 72 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 784 (1983) ..... *passim*

NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972) 11, 12, 13

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	9, 10
NLRB v. Lion Oil Co., 352 U.S. 282 (1957)	19, 21
NLRB v. Savair Manufacturing Co., 414 U.S. 270 (1973)	9
Pepper v. Litton, 308 U.S. 295 (1939)	16
Proctor & Gamble Ind. Union v. Proctor & Gamble Mfg. Co., 312 F.2d 181 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963)	19
Rebmar, Inc., 173 N.L.R.B. 1434 (1968)	9
Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975)	2, 3, 16, 18, 20
Southport Petroleum Co. v. NLRB, 315 U.S. 100 (1942)	12
Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942)	15
Unit Parts Co., 10 B.R. 970 (Bankr. W.D.Okla. 1981)	12
United States v. Powell, 379 U.S. 48 (1964)	16
United States v. Whiting Pools, Inc., —— U.S. ——, 51 U.S.L.W. 4705 (June 8, 1983)	3
OTHER	
8 Collier on Bankruptcy (14th ed. 1978)	20
Report of The Commission on the Bankruptcy Laws of The United States, H.R. Doc. No. 137, Pt. I, 93d Cong. 1st Sess. 89 (1973)	20
STATUTES	
11 U.S.C. § 365(a) (Supp. V 1981)	*passim*
11 U.S.C. § 507 (Supp. V 1981)	4
11 U.S.C. § 621 (1976)	16
11 U.S.C. § 1129(b)(1) (Supp. V 1981)	16
15 U.S.C. § 631(a) (1976)	7
29 U.S.C. § 157 (1976)	9
29 U.S.C. § 158(d) (1976)	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-818 and 82-852

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE AMICUS

In this consolidated case, petitioner National Labor Relations Board (NLRB) and petitioner Local 408, International Brotherhood of Teamsters (Union) are urging this Court to rule that union employees must be exempted from sharing any of the burdens of a reorganization unless the bankruptcy court finds that imposing the maximum possible sacrifices upon nonunion personnel and other nonsecured creditors will not suffice to save the employer. Moreover, the Union is urging that the complex and lengthy procedures for terminating collective bargaining agreements should be superimposed on

the statutory procedures for rejecting the executory contracts of a debtor.

Accepting petitioners' positions would make reorganizations under Chapter 11 of the Bankruptcy Code impractical, unfairly distribute the inherent burdens of reorganization, and seriously distort national labor policy. In addition to being contrary to law and the public interest, such an outcome would prejudice the business community, including many of the members of the Chamber of Commerce of the United States (Chamber), the largest business and professional organization in the United States. Thus, on behalf of its membership, which includes more than 4,000 state and local chambers of commerce and trade and professional organizations as well as 208,000 business firms and individual direct members, the Chamber submits this amicus brief.

Petitioners base their argument primarily upon *Brotherhood of Railway Clerks v. REA Express.*[1] There, without explanation or apparent recognition that it effectively was reversing its own newly established *Kevin Steel* decision calling for a balancing of the equities,[2] a panel of the Second Circuit said that a collective bargaining agreement may not be rejected so that union workers may share the burdens of reorganization unless imposing even the maximum possible sacrifices upon non-union employees and other creditors would be insufficient to avoid liquidation.

In the *Bildisco* case now under review, the Third Circuit concluded that the *REA Express* extreme necessity test goes further than is necessary to accommodate the Bankruptcy Code to federal labor policy. While agreeing that labor contracts merit special consideration, the Third Circuit declined to foreclose threshold consideration of the sacrifices being made by other workers and

---

[1] 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975).

[2] Shopman's Local Union No. 455 v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975).

creditors. Instead, citing the Second Circuit's *Kevin Steel* precedent which predated *REA Express*, it held that rejection should be permitted where the trustee or debtor-in-possession proves that (1) the labor contract is burdensome to the business to be reorganized, and (2) rejection would be equitable in view of all the circumstances, including the burdens being shared by other workers and creditors. That holding recently has been approved by the Eleventh Circuit in *In re Brada Miller Freight Systems, Inc.*[3]

The Chamber believes that the flexible approach of the Third and Eleventh Circuits and the early Second Circuit precedent, fully accommodates federal bankruptcy and labor policy. The more extreme and inflexible position urged by petitioner would violate both policies and be seriously unfair to nonunion personnel and other creditors. The flexible approach of the Third and Eleventh Circuits will not deprive any union of the rights to recognition, to engage in good faith bargaining, or to strike; all of those rights survive rejection of a labor contract. Nor will that approach foster antiunion animus—of which there is no hint in this record—since the bankruptcy courts will assure that any rejection is made in good faith. Accordingly, the Chamber urges this Court to affirm the Third Circuit decision under review.

SUMMARY OF THE ARGUMENT

Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 et seq., reflects Congress' judgment that the best means of preserving jobs and maximizing recovery by all creditors is to reorganize insolvent businesses.[4] Rejection of

---

[3] 702 F.2d 890 (11th Cir. 1983).

[4] The operation of Chapter 11, and the role of the debtor-in-possession, are discussed in United States v. Whiting Pools, Inc., —— U.S. ——, 51 U.S.L.W. 4705, 4706-08 (June 8, 1983). There, the Court noted that an important objective of Chapter 11 was to preserve jobs, *id.* at 4707, and held that Chapter 11 had primacy over procedures otherwise applicable to enforcement of federal tax

burdensome executory contracts under Section 365(a) is a central feature of such reorganizations. Burdensome collective bargaining agreements, which often are the major obstacle to a debtor's economic vitality plainly are within Section 365(a). Thus, foreclosing a reasonable rejection of such contracts strikes at the very heart of Chapter 11 and must be supported by compelling justification.

There is no dispute here that federal labor policy justifies giving some special consideration to collective bargaining agreements. Instead, the issue is the extent to which Chapter 11 must be impaired to accommodate that policy. The Third and Eleventh Circuits have concluded that labor policy is adequately served by adding to the traditional "burdensomeness" standard a requirement that the bankruptcy court balance all of the competing equities, giving weight both to the special interests of employees and to the sacrifices being imposed on others. Petitioners seek to go further, however, erecting a rigid threshold bar to rejection unless that is the only possible way to avoid liquidation.

While petitioners never expressly recognize this, the effect of the proposed extreme necessity test would be to force the bankruptcy court to attempt to squeeze all possible sacrifices out of nonunion personnel and unsecured creditors before requiring union workers to share any of the burdens of reorganization. This harsh discrimination is contrary to the fundamental labor policy of neutrality between union and nonunion employees, as well as the bankruptcy policies of fairness and equity. The discrimination is not necessary to preserve labor peace, but,

---

liens. Contrary to the suggestion of the NLRB's Petition for Certiorari (at 25) rejection of a collective bargaining agreement does not leave workers without protection. Claims accruing prior to filing are entitled to the statutory priorities established for employees by 11 U.S.C. § 507. Claims accruing after filing and before rejection are costs of administration entitled to priority over all but secured creditors. 11 U.S.C. § 507(a)(1).

if anything, may provoke unrest. And far from promoting collective bargaining, the possibility of avoiding all of the burdens of reorganization gives unions a strong incentive to refuse to negotiate over their fair share of the burdens. In short, the proposed test is so extreme that it would violate both labor and bankruptcy policy.

The petitioning Union—but not the NLRB—seeks further to insulate union workers from sharing the burdens of reorganization by requiring trustees or debtors-in-possession to comply with Section 8(d) of the National Labor Relations Act; 29 U.S.C. § 151 et seq. ("NLRA"), which establishes lengthy and cumbersome procedures for contract renegotiation, before seeking rejection. As the NLRB recognizes, however, this would be impractical and would unduly impair Chapter 11 because of the two-month delay and uncertain benefits involved. Moreover, it would not advance the limited purposes of Section 8(d), *e.g.*, to provide a limited "cooling off" period, to prevent "quickie" strikes seeking to force mid-term contract concessions.

Accordingly, the Chamber urges this Court to approve the standards for the application of Section 365(a) adopted by the Third Circuit in this case and the Eleventh Circuit in *Brada Miller*, and to reject both the extreme threshold test proposed in *REA Express* and the Union's attempt to engraft Section 8(d) onto Section 365(a). The Chamber takes no position on the other issues in this case.[5]

---

[5] The NLRB asserts in its preliminary discussion of the law that economic hardship short of bankruptcy never excuses any failure to perform any obligation imposed by a collective bargaining agreement. Brief for the National Labor Relations Board, National Labor Relations Board, Petitioner v. Bildisco and Bildisco, Debtor-In-Possession, No. 82-818 and Local 408, International Brotherhood of Teamsters, Petitioner v. National Labor Relations Board, No. 82-852 (May, 1983) ("NLRB brief") at 17. This Court has never so held, and this is not the case for that issue to be decided. A simple default under a contract cannot be equated with a rejection under Section 365(a).

ARGUMENT

I. THE HARSH DISCRIMINATIONS AND INFERIOR PLANS OF REORGANIZATION MANDATED BY THE MECHANICAL THRESHOLD TEST URGED BY PETITIONERS ARE CONTRARY TO FEDERAL BANKRUPTCY AND LABOR POLICIES AND SHOULD BE REJECTED.

Petitioners assert that the threshold extreme necessity test is compelled by the policies of the NLRA, but they fail to examine the practical effects of that test. In fact, the proposed test will inflict harsh and unnecessary discrimination on nonunion workers and other creditors and otherwise will frustrate the policies of both the NLRA and the Bankruptcy Code.

A. The Proposed Test Compels Bankruptcy Courts To Squeeze All Possible Sacrifices Out of Nonunion Employees Without Regard for Competing Equities Before Assigning Any Burden to Union Employees.

A debtor's work force never consists solely of union workers covered by a collective bargaining agreement. By law, supervisors and managers are excluded from the coverage of such agreements. Moreover, it is quite common for only some worker groups to be unionized while others are not, even in the same facility.

Under the proposed extreme necessity test, the bankruptcy court would have to prefer *any* possible alternative that might avoid liquidation while preserving the labor contract. Thus, the bankruptcy trustee or debtor-in-possession first would have to attempt to squeeze the *entire* amount of any necessary reduction in labor costs from the *nonunion* employees. Only if this proved impossible could the collective bargaining argument be rejected so that a share of the burden could be assigned to workers under a collective bargaining agreement. For example, if an immediate, short term 10 percent reduction in total labor costs were necessary and half of the

work force were unionized, the court would have to require the trustee or debtor-in-possession either to reduce nonunion wages by 20 percent while leaving union wages unchanged or prove that this was impossible.[6]

Similarly, a debtor generally will have an array of unsecured creditors. Among these may well be nonunion employees as well as many small businesses or sole proprietorships. Under the proposed threshold test, the bankruptcy court would have to completely deny these creditors any repayment if that would permit a possibly successful reorganization without any reduction in the wages or benefits of union workers. The court could not consider the resulting hardship to these businesses and their employees, nor could it give weight to such federal policies as those of encouraging small business.[7]

This type of discrimination occurred in *In re David A. Rosow, Inc.*[8] There the debtor had reduced the wages of 125 nonunion workers by 10 percent and proposed to do the same with respect to the 12-14 workers covered by a Teamsters contract. The bankruptcy court did not question that substantial labor cost reductions were necessary. Nevertheless, it refused to allow rejection, saying that the union workers were such a small component of the total work force, it could not conclude that it was necessary for their wages to be reduced. The NLRB cites

---

[6] Many permutations of this basic pattern readily come to mind. For example, there may be several unions, some of which have consented to reductions while others have refused. Or one union's contract fortuitously may be expiring while another's has years left to run. In each case, the common result is serious inequity in which some employees get a free ride on the sacrifices of others simply because the terms of their employment are set by a collective bargaining agreement rather than by some other form of contract.

[7] This strong policy amply is evidenced by the Small Business Act, 15 U.S.C. § 631(a) (1976). (The "Government should aid . . . and protect, insofar as is possible, . . . small business concerns . . .")

[8] 9 B.R. 190 (Bankr. D. Conn. 1981).

Rosow as a case that "accepted and applied" the standard it is urging here.[9]

The petitioners' briefs do not even acknowledge, much less try to defend, this discrimination against nonunion workers. The NLRB brief asserts, however, that commercial debtors properly are subjected to discrimination because they can "spread risk among numerous customers." [10] This is an unsupportable and inaccurate generalization. Many small businesses and sole proprietorships operate as satellites of only one or a few major customers. Moreover, the amount such creditors stand to lose often will far exceed the claims of any single worker and may suffice to force them into bankruptcy also, causing their employees to lose their jobs as well. Thus, it often may be most equitable to distribute a share of the burden over the members of a unionized work force in order to permit partial repayment of other creditors.

In short, bankruptcy is a situation that calls for flexibility and balancing, not for rigidity. To the extent that these equities are important, they can only be evaluated on a case-by-case basis. But the *threshold* extreme necessity test urged by petitioners generally will preclude these equities from being considered. As discussed below, the result is to violate basic policies of both the NLRA and the Bankruptcy Code.

B. The Effects of the Proposed Threshold Test Would Violate Federal Labor Policy.

Without ever fully acknowledging the nature and severity of the discrimination the proposed test would inflict, petitioners assert that any unfairness or injury is justified by federal labor policy. In fact, considerations of federal labor policy alone would dictate that the test be rejected.

---

[9] NLRB Brief at 24 n.13.

[10] *Id.* at 22.

1. *The discrimination against nonunion workers mandated by the proposed test violates the strong labor policy of neutrality between union and nonunion workers.*

The discrimination inflicted by the proposed test against workers who have elected not to engage in collective bargaining violates one of the most basic policies of the NLRA. Section 7 of the NLRA expressly guarantees to employees the right to make an unfettered choice whether to engage in collective bargaining or "to refrain from any or all of such activities." [11] This reflects a Congressional judgment that the government should remain "wholly neutral" as to whether or not employees should unionize and bargain collectively.[12]

Pursuant to this policy, the Board repeatedly has held that its representatives must display complete neutrality and impartiality with respect to unionizing campaigns and elections.[13] Indeed, the Board has assigned this policy such high priority that, from time to time, it has found that conduct by private parties which created the false appearance of Board support for unionization was a sufficient basis to invalidate a representative election.[14]

The policy of neutrality does not mean that union employees must be denied the normal incidents of working

---

[11] 29 U.S.C. § 157 (1976).

[12] NLRB v. Savair Mfg. Co., 414 U.S. 270, 278 (1973). *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) ("[The NLRA] goes no further than to safeguard the right of employees to self-organization . . . for collective bargaining . . . without restraint or coercion . . ."). *See also* Local 57 ILGWU v. NLRB, 374 F.2d 295, 300-01 (D.C. Cir. 1967) (Burger, J.), *cert. denied*, 387 U.S. 942 (1967) (this neutrality is "one of the Act's most basic policies").

[13] Allied Electric Products, Inc., 109 N.L.R.B. 1270 (1954); Rebmar, Inc., 173 N.L.R.B. 1434 (1968).

[14] *See, e.g.*, Allied Electric Products, 109 N.L.R.B. at 1272 ("no participant . . . should . . . suggest . . . that this Government Agency endorses a particular choice").

under an employment contract. To the contrary, the NLRA legitimated collective bargaining precisely so workers could seek such contracts if they so chose.[15] It does mean, however, that the federal government generally should not tip the scales toward or against unionization, particularly through economic inducements.

It is consistent with the policy of neutrality to allow workers covered by collective bargaining agreements whatever benefits may be accorded other parties to executory contracts. While this may give union workers some claims against the estate not shared by workers whose terms of employment are established more informally,[16] that is a normal result of the way contracts are treated in bankruptcy. The policy of neutrality is violated, however, if the bankruptcy court confers special valuable protection on some employees, while imposing additional sacrifices on others, simply because the favored group chose to engage in collective bargaining. That is *not* a normal incident to contracting, since burdensome executory contracts generally are subject to rejection under Section 365(a). Instead, it is an improper discrimination inflicted upon the disfavored employees flowing solely from their protected decision not to unionize.

2. This discrimination is not necessary to preserve labor peace by fostering collective bargaining.

Petitioners' argument that these results are compelled by the federal policy favoring collective bargaining is

---

[15] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. at 57 (1937).

[16] It should not be assumed that nonunion workers never have employment contract rights. Some, such as salesmen, may have express, individual contracts. Others may have contractual rights established by reliance upon personnel manuals or otherwise. The existence and validity of such contracts is, of course, a matter of state law. *See, e.g.*, Belknap, Inc. v. Hale, —— U.S. ——, 127 DLR D-1 (June 30, 1983) (sustaining state contract action by nonunion strike replacements).

specious. As recognized by the NLRB [17] and the Union,[18] the underlying purpose of authorizing collective bargaining was to preserve labor peace. While that goal could be frustrated by arbitrary or excessive impairments of collective bargaining agreements, there is no reason to believe that subjecting such agreements to termination in the special circumstance of a Section 11 reorganization would have that result.[19] Indeed, if anything is likely to provoke labor unrest, it is subjecting one class of workers to seriously discriminatory treatment while exempting another class, which is just what the proposed test does.

The NLRB made a similar policy argument in its efforts to persuade this Court that when a business changes hands the new owner routinely should be held to its predecessor's collective bargaining agreement.[20] This Court rejected that result because (i) it was contrary to normal principles of contract law and (ii) would "discourage and inhibit the transfer of capital." [21] Instead, it concluded that the policies favoring collective bargaining were adequately preserved by allowing a new owner who intends to continue the same business to set initial terms of employment but requiring it to recognize the incumbent union and bargain over subsequent

---

[17] NLRB brief at 18.

[18] Union brief at 29.

[19] The debtor-in-possession will have a strong interest in avoiding a crippling strike, *see infra* at I.B.3., and the bankruptcy court will evaluate the risk of a strike in deciding whether to allow rejection. If, as the NLRB (NLRB brief at 42) and the Union (Union brief at 31) insist, the union generally will be eager to bargain, there is even less risk.

[20] *See, e.g.*, NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972).

[21] *Id.* at 287-88.

changes if the new owner hires a majority of the previous owner's employees.[22]

As discussed by the court below, there is a strong argument to be made that a trustee or debtor-in-possession is a "new entity" to which the debtor's assets have been assigned. This would suggest that the trustee or debtor-in-possession is a successor which *automatically* should have the right to establish new terms of employment.[23] But this Court need not go so far to uphold the Third Circuit in this case. Instead, the rationale of *Burns* may be applied because (i) all executory contracts normally are subject to rejection under 365(a), and (ii) permitting such a rejection to further a Section 11 reorganization will both encourage the transfer of capital to the debtor and foster the purposes of the Bankruptcy Code. That rationale is more than sufficient to overcome any policy favoring enforceability of collective bargaining agreements, at least to the extent contemplated by the Third Circuit, without regard to the status of the trustee or debtor-in-possession.[24]

---

[22] The duty to bargain arises only if a majority of the previous work force is retained and other conditions are met. *See* NLRB brief at 34 n.19.

[23] The Board's attempt to equate the debtor-in-possession with an "alter ego" is totally unpersuasive. That doctrine is directed toward formal changes in ownership made in a sham attempt to go nonunion. Carpenters Local No. 1846 v. Pratt-Farnsworth, 690 F.2d 489, 507-08 (5th Cir. 1982) (collecting cases); *see* Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942) ("disguised continuance"). In contrast, a Chapter 11 reorganization must be done in good faith and produces a profound effect on the creditor. Moreover, the trustee or debtor-in-possession must act for the benefit of the creditors, a distinct and substantial change from the employer's pre-filing obligations. *Cf.* Unit Parts Co., 10 B.R. 970, 979 (Bankr. W.D.Okla. 1981) (debtor-in-possession not an alter ego).

[24] This Court has admonished that the *Burns* decision reflects broad policy considerations rather than legal technicalities, and that the concept of "successor" should vary with the circumstances. Howard Johnson Co. v. Detroit Local Joint Exec. Bd., 417 U.S. 249,

Indeed, the Eleventh Circuit expressed the view that the considerations discussed in *Burns*, especially the need to facilitate "the most efficient use of the nation's resources," apply in the bankruptcy context "with perhaps even greater force." [25] Accordingly, the Eleventh Circuit concluded it was critical not to place collective bargaining agreements in a "stranglehold position" that "would often . . . [make it] . . . impossible to induce fresh management and capital to participate in the revitalization of a bankrupt enterprise." [26]

Because the NLRB's policy argument here has the additional weakness of inflicting harsh discrimination against nonunionworkers, it is much less tenable than in *Burns* where it was rejected in favor of the policy favoring a free flow of capital. Moreover, as shown below, the NLRB's position here actually undermines collective bargaining.

3. *In fact, the proposed test would remove important incentives to collective bargaining that the approach of the Third and Eleventh Circuits preserves.*

The approach of the Third and Eleventh Circuits preserves important incentives to collective bargaining that the proposed test eliminates or seriously weakens. Thus, contrary to petitioners' claims, that approach better serves the goal of encouraging unions and employers to resolve

---

262-63 n.9 (1974). The NLRB tacitly concedes that the rationale of the successorship cases applies to the present case. NLRB brief at 38 n.25.

[25] Brada Miller, 702 F.2d at 897. Surprisingly, the *REA Express* decision includes very similar language to the effect that the principles underlying *Burns* are "particularly applicable" in bankruptcy. 523 F.2d at 170.

[26] Brada Miller, 702 F.2d at 897.

their differences by collective bargaining—as opposed to petitioners' goal of favoring union workers.

As a general proposiiton, an employer who is approaching insolvency is more than willing to negotiate wage and benefit reductions with a union. If significant union concessions can be obtained, that often will persuade creditors to accept informal arrangements that will avoid the necessity for bankruptcy. And even if bankruptcy cannot be avoided, a prior favorable modification of the collective bargaining agreement greatly increases the prospects for a prompt and successful reorganization.

On the other hand, a union has strong disincentives to negotiate such concessions. Obviously, it would prefer to maintain the wages and benefits of its members if at all possible. Beyond that, it may fear that entering negotiation will be seen as a sign of weakness and ineffectiveness. And if the local union is part of a larger organization, as is true in this case, it may well be under very strong pressure to avoid setting an area or national precedent.

The proposed threshold extreme necessity test would greatly magnify these disincentives to bargaining by holding out the prospect that, even if the employer were forced into reorganization, union workers still might avoid any of the burden. Thus, contrary to the suggestion in the NLRB brief [27] the prospect of an impending reorganization would not suffice, in itself, to bring a union to the bargaining table.[28] Instead, a shrewd union

---

[27] NLRB brief at 42-43.

[28] The NLRB tacitly concedes this by arguing that "the union . . . shares the employer's interest in ensuring the preservation of the business; if the business fails, the employees lose their jobs." *Id.* at 42. In other words, it is only when union concessions are absolutely necessary to prevent liquidation that the union would be motivated to bargain under the proposed test. The NLRB brief does not even acknowledge that local unions often may be under pressure from their parent organizations to refuse concessions to a particular employer because of the precedent that would be set.

would bargain only if it believed that a bankruptcy court would find that union concessions were absolutely necessary to avoid liquidation. In a doubtful case, the union would have to consider whether the benefits of bargaining immediately outweighed the chance to avoid all burdens of reorganization, and often would opt not to bargain.

In contrast, the approach of the Third and Eleventh Circuits encourages the union to consider bargaining whenever there is a threat that the employer may face insolvency. Early bargaining offers the union the chance to participate in framing modifications which may either render the labor contract non-burdensome or convince the court that setting it aside would be inequitable. And early bargaining will not be discouraged by the hope of absolute protection that would be offered by the test petitioners are proposing. Thus, it is the approach of the Third and Eleventh Circuits, rather than the threshold extreme necessity test, that most effectively encourages collective bargaining in this situation.

C. The Proposed Test Also Would Violate the Bankruptcy Code's Policies of Fairness, Equitability, and Feasibility.

The fact that petitioners' proposed threshold extreme necessity test would violate federal labor policy is reason enough to reject it, since no other justification has been offered. But even if the test would advance labor policy to a degree—and it would not—any such advance would be more than offset by the serious violence the test would do to basic policies of the Bankruptcy Code.[29]

---

[29] *See* Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Act so single-mindedly that it may ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another . . ."). The Board's argument that Congress ratified *REA Express* when it adopted the Bankruptcy

This Court has recognized that a bankruptcy proceeding is essentially equitable in nature, and that the role of the bankruptcy court is to "see that injustice or unfairness is not done." [30] A plan of reorganization must be "fair and equitable, and feasible." [31] These goals are reflected plainly in Chapter 11 of the Bankruptcy Code, which authorizes approval of a reorganization plan over a creditor's objection only if it seems likely to succeed and "does not discriminate unfairly, and is fair and equitable." [32]

Plainly, it is unfair and inequitable to adopt a test which has the effect of casting the primary burdens of reorganization on nonunion employees and other creditors while totally exempting union workers. This is not an ordinary or necessary incident of the fact that union employees work under contract, since as both petitioners admit, Section 365(a) expressly permits such contracts to be set aside. Nor does it reflect any difference in the economic status or capacity to absorb loss of the favored and disfavored parties. It is, instead, an unjustified dis-

---

Code in 1978 is specious. Since *REA Express* conflicted with *Kevin Steel*, and no other appellate court had addressed the issue, there plainly was no "settled judicial construction" to be ratified. *See* United States v. Powell, 379 U.S. 48, 55 n.13 (1964).

[30] Pepper v. Litton, 308 U.S. 295, 307-08 (1939); *see* In re Economy Cast Stone Co., 16 B.R. 647, 650-51 (Bankr. E.D.Va. 1981).

[31] In re Muskegon Motor Specialities, 366 F.2d 522, 525 (6th Cir. 1966) (quoting 11 U.S.C. § 621 (1976)).

[32] 11 U.S.C. § 1129(b)(1) (Supp. V 1981). Similarly, it has been said that the analogous reorganization provisions of Chapter 13 require "fundamental fairness" to all creditors, In re Beaver, 2 B.R. 337, 340 (Bankr. S.D.Cal. 1980); that "[t]he spirit and letter of Chapter 13 requires that all similarly situated creditors be given equal treatment," In re Cooper, 3 B.R. 246, 249 (Bankr. S.D.Cal. 1980); and that manipulating classes of creditors violates the "policy of equal distribution" and is "unfairly discriminatory." In re Pine Lake Village Apartment Co., 19 B.R. 819, 830-31 (Bankr. S.D.N.Y. 1982).

crimination repugnant to the policies of the Code. As the Eleventh Circuit concluded in *Brada Miller*, "[t]o elevate this single consideration to such a dominant and decisive position allows the issue of rejection to be settled without any consideration of the interests of other parties involved, [and is] a total abdication of the policies behind the bankruptcy laws." [33]

Moreover, the proposed test undermines the work of the bankruptcy court by shifting the attention of the trustee or debtor-in-possession from attempting to develop the reorganization plan that is most likely to succeed to a search for any plan that will preserve the collective bargaining agreement. As the Third Circuit has pointed out, however, reorganization is not so fine a science that the outcome of marginal plans easily is foreseen.[34] Thus, the likely result will be liquidations that could have been avoided, accompanied by total loss of jobs for all employees.[35] This is the point the Eleventh Circuit was driving at when it criticized *REA Express* for precluding "accommodation of the conflicting interests at stake in a rejection proceeding." [36]

* * * *

In short, the decision of the Third Circuit, as endorsed by the Eleventh, fairly accommodates the policies of the federal labor and bankruptcy acts and the interests they protect. The threshold extreme necessity test proposed by petitioners seriously distorts both policies and harshly and unreasonably discriminates against nonunion workers and other creditors and, therefore, should be rejected.

---

[33] 702 F.2d at 899.

[34] Bildisco, 682 F.2d at 80.

[35] Alternatively, in cases where liquidation is avoided, the inferior plan of reorganization often will lead only to partial recovery over a prolonged period, perhaps providing only a fraction of the jobs that a robust recovery would produce.

[36] Brada Miller, 702 F.2d at 899.

II. THE LENGTHY AND CUMBERSOME PROCEDURES FOR CONTRACT TERMINATION ESTABLISHED BY SECTION 8(d) OF THE NLRA SHOULD NOT BE IMPORTED INTO CHAPTER 11 OF THE BANKRUPTCY CODE.

In an effort to insulate union workers even further from bearing their fair share of the burdens of a Chapter 11 reorganization, the Union argues that a trustee or debtor-in-possession should be required to follow the lengthy and cumbersome procedures for termination of collective bargaining agreements established by Section 8(d) of the NLRA. 29 U.S.C. § 158(d). Such a requirement would seriously distort both the intent and language of Section 8(d) and would frustrate implementation of Chapter 11. Every appellate court to consider the issue has rejected the Union's position,[37] as has the NLRB—the agency that would have to oversee such 8(d) notice requirements.[38] This Court should do likewise.

Simply stated, Section 8(d) provides that no "party" may "terminate" or "modify" a collective bargaining agreement except pursuant to an elaborate procedure that

---

[37] *See* In re Brada Miller Freight System, Inc., 702 F.2d 890, 897 (11th Cir. 1983); NLRB v. Bildisco, 682 F.2d 72, 78 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 784 (1983) (the case presently under review); Brotherhood of Railway Clerks v. REA Express, 523 F.2d 164, 166 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975); Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., 519 F.2d 698, 705 (2d Cir. 1975); Local Joint Exec. Bd. v. Hotel Circle, Inc., 419 F.Supp. 778, 789 (S.D. Cal. 1976), *aff'd*, 613 F.2d 210 (9th Cir. 1980).

[38] NLRB brief at 18-19, Union brief at 11. Because of its institutional role and expertise, the NLRB's interpretation of Section 8(d) to exclude coverage of rejections under Section 365(a) is entitled to special deference. Bill Johnson's Restaurants, Inc. v. NLRB, —— U.S. ——, 51 U.S.L.W. 4636, 4639 (May 31, 1983). On the other hand, the NLRB has no institutional role to play in deciding the standards that should govern a Section 365(a) rejection. As to that issue, the courts are expert and should not defer to the NLRB.

imposes a waiting period of 60 days before either party can treat the agreement as terminated; even then the agreement may be considered terminated only if it has expired.[39] This 60-day delay is the very heart of the provision. Thus, this Court explained in *NLRB v. Lion Oil Co.*, the legislative history of Section 8(d) reveals that

> both the sponsors and the opponents of the bill saw in § 8(d)(4) no more than a means of preventing "quickie" strikes by requiring a "cooling-off" period . . .[40]

The inherent delays involved in seeking and obtaining judicial authority to reject a contract under Section 365(a) already provide a "cooling off" period. Thus, the central legislative goals of Section 8(d) would not be served by engrafting it onto the Bankruptcy Code. Moreover, the resulting additional delay and complexity would seriously impair implementation of Chapter 11. Thus, the NLRB correctly concludes that

---

[39] The full text of Section 8(d) appears in the NLRB brief, *supra* note 6 at 3-4. The Court should not be misled by the Union's hypothetical discussion of facts with no relation to this case. The debtor-in-possession here is not claiming any right to terminate its labor contract without prior court approval.

[40] 352 U.S. 282, 292 (1957). In *Lion Oil* the Court found it necessary to attribute some additional meaning to the statutory language to avoid incongruity and harmonize it with the rest of the NLRA, but that did not affect its view of the provision's central purpose. The NLRB similarly has viewed Section 8(d) as being narrowly directed at minimizing disruptive "quickie" strikes through a "cooling off" period. Jet Line Products, Inc., 229 N.L.R.B. 322, 323 & n.2 (1977), and cases cited therein. *See also* Proctor & Gamble Ind. Union v. Proctor & Gamble Mfg. Co., 312 F.2d 181, 190 n.9 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963) ("Section 8(d) was intended to provide a cooling off period . . .").

> the elaborate procedure of notices and waiting periods prescribed in Section 8(d) . . . is not well suited to the expeditious determination of whether the bankrupt business can survive without some adjustment in the existing contract.[41]

This plain incompatibility in itself is a more than adequate basis for concluding that Section 8(d) does not apply to Section 365(a) rejections.[42] But there is yet another compelling rationale for this conclusion that has been adopted by both the Second and Third Circuits and which is termed a "useful analytical tool" by the Eleventh Circuit.[43] This is the "new entity" analysis that the NLRB and the Union attack so vigorously.

By its express terms, Section 8(d) applies only to terminations or modifications by a "party" to the collective bargaining agreement. As the Second Circuit pointed out in *Kevin Steel*, however, a trustee or debtor-in-possession is not the same legal entity as the pre-bankruptcy company, but is "a new entity . . . with its own rights and duties, subject to the supervision of the bankruptcy court."[44] Thus, the Second Circuit held that

---

[41] NLRB brief at 41. The NLRB states that Section 8(d) never requires a union to bargain during the term of a collective bargaining agreement (*id.*), but this Court has not ruled on that point and need not do so here. For present purposes, it is enough that Section 8(d) can be used to stall and perhaps frustrate reorganization.

[42] The Union argues that bankruptcy proceedings already are so complex and lengthy that a few more months and complications should be acceptable. Union brief, *supra* note 8 at 31-32. The goal should be to reduce, rather than magnify, this complexity, however. *See* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, Pt. I, 93d Cong. 1st Sess. 89 (1973). Moreover, even the Union must concede that where expedition is essential, Section 8(d) must yield to Section 365(a). Union brief, *supra* note 8 at 31, n.*.

[43] Brada Miller, 702 F.2d at 894.

[44] Kevin Steel, 519 F.2d at 704; *see* 8 Collier on Bankruptcy ¶ 6.30-.32; Cramer v. Mammoth Mart, Inc., 536 F.2d 950, 954 (1st

the debtor-in-possession is not a "party" within the meaning of Section 8(d),[45] and the Third Circuit agreed in the present case.[46]

The central point—and one upon which all appellate courts and the NLRB agree—is that Section 8(d) does not govern Section 365(a) rejections. Whether that result is reached by balancing broad policies as preferred by the NLRB and the Eleventh Circuit or by the more specific analysis of statutory language employed by the Second and Third Circuits, the conclusion is the same.

Cir. 1976) ("a separate legal entity . . . [existing] . . . principally for the benefit of the pre-filing creditors"). The Second Circuit was quick to point out that it was not asserting that a debtor-in-possession was a new entity for all purposes. In re Unishops, 543 F.2d 1017, 1018-19 (2d Cir. 1976). Instead, it mean only that when the debtor-in-possession, acting as an officer of the bankruptcy court and under the court's direct supervision, exercised the special power conferred by Section 365(a), it was not acting as a "party" to the contract within the meaning of Section 8(d).

[45] Kevin Steel, 519 F.2d at 704. Although *Brada Miller* criticizes the new entity theory in the context of Section 8(d), it appears to accept the general proposition that the debtor-in-possession is a "new juridical entity" for purposes of "the broad powers granted to a debtor-in-possession under the bankruptcy laws." 702 F.2d at 895 & n.14. Section 365(a) would seem to confer such a power.

[46] Bildisco, 682 F.2d at 78-79. Similarly, Section 8(d) clearly contemplates terminations or modifications arising out of bilateral dealings between the employer and the union. In *Lion Oil*, this Court recognized that "termination" is used in a special sense in Section 8(d). Accordingly, rejection of a collective bargaining agreement pursuant to approval of the bankruptcy court is not the type of termination contemplated by Section 8(d).

CONCLUSION

Petitioners' attempt to give union employees virtually complete immunity from the burdens of a Chapter 11 reorganization at the expense of nonunion personnel and other creditors is contrary to federal labor policy and bankruptcy policies and should be rejected. The flexible approach of the Third and Eleventh Circuits, which recognizes the special interests of employees but permits a broad balancing of all equities in deciding whether to approve rejection of a collective bargaining agreement, better promotes federal labor and bankruptcy policies and should be affirmed.

Respectfully submitted,

JOHN S. IRVING
CARL L. TAYLOR
KIRKLAND & ELLIS
1776 K Street, N.W.
Washington, D.C. 20006
(202) 857-5000

Of Counsel:
STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337